

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

DONALD R. MASIAS,

*

No. 99-697V

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Special Master Christian J. Moran

Petitioner,

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v.

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Filed: June 7, 2012

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SECRETARY OF HEALTH
AND HUMAN SERVICES,

*

Attorneys' fees for appellate
litigation; "fees for fees,"
degree of success

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Respondent.

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Robert T. Moxley, Robert T. Moxley, P.C., Cheyenne, WY, for Petitioner;
Catharine Reeves, United States Dep't of Justice, Washington, DC, for Respondent.

DECISION ON SECOND SUPPLEMENTAL APPLICATION
FOR ATTORNEYS' FEES AND COSTS*

Represented by Attorney Robert Moxley, Mr. Masias seeks attorneys' fees for unsuccessful appeals that sought to increase the amount of attorneys' fees awarded previously. This type of request is known as "fees for fees" or "supplemental fees." The Secretary opposes any award.

For supplemental fees, the Federal Circuit has focused on the "degree of success." In the appellate litigation here, Mr. Masias has not achieved any success. His request for additional fees, therefore, is denied.

I. PROCEDURAL HISTORY

A. Previous Awards of Attorneys' Fees to Mr. Masias

The undersigned has awarded Mr. Masias attorneys' fees three times, twice in 2009 and once in 2010. Since the 2010 decision, Mr. Masias filed an appeal to the Federal Circuit, which

* The E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002), requires that the Court post this decision on its website. Pursuant to Vaccine Rule 18(b), the parties have 14 days to file a motion proposing redaction of medical information or other information described in 42 U.S.C. § 300aa-12(d)(4). Any redactions ordered by the special master will appear in the document posted on the website.

affirmed the Court of Federal Claims' judgment, and a petition for certiorari to the United States Supreme Court, which was denied. The Federal Circuit appeal and the petition for certiorari are the focus of Mr. Masias's pending application for attorneys' fees.

Mr. Masias's pending claim for attorneys' fees flows from his underlying claim that the hepatitis B vaccine caused him to suffer arthritis. Mr. Masias's case was fairly typical, although the duration of the merits phase was longer than normal at Mr. Masias's request. The merits phase concluded with an agreement regarding entitlement and compensation. Decision, filed Dec. 27, 2007.

After the case entered the attorneys' fees phase, the parties had several significant disputes. These were resolved in a series of decisions.

Mr. Masias filed his original application for attorneys' fees and costs on March 10, 2008, covering Mr. Moxley's work from September 30, 1998 to February 6, 2008. This application requested that Mr. Moxley be compensated at an hourly rate set out in the Laffey matrix. Mr. Masias also requested that he be awarded attorneys' fees on an interim basis, pursuant to Avera v. Sec'y of Health & Human Servs., 515 F.3d 1343, 1349 (Fed. Cir. 2008). The Secretary opposed an award of attorneys' fees on an interim basis and opposed compensating Mr. Moxley at Laffey rates.

A March 12, 2009 decision accepted Mr. Masias's proposal to award some amount of attorneys' fees on an interim basis. Interim Fees Decision, 2009 WL 899703. One reason was that the duration of litigation over attorneys' fees was anticipated to be lengthy.

The Interim Fees Decision awarded attorneys' fees for portions that could not be disputed reasonably, which was \$42,065.50 in attorneys' fees and \$6,302.15 in costs.¹ The attorneys' fees were calculated by using a reasonable hourly rate for Cheyenne, Wyoming (the location of Mr. Moxley's practice) and a reasonable number of hours. The Interim Fees Decision reserved the question of Laffey rates for another decision. Similarly, the Interim Fees Decision did not adjudicate the amount spent on litigating the fee request, nor did the Interim Fees Decision resolve the disputed costs. An award of approximately \$50,000 in attorneys' fees and costs is in line with other cases whose procedural history compared to Mr. Masias's case. The Court of Federal Claims entered judgment in accord with the Interim Fees Decision on April 24, 2009.

The issues left open in the Interim Fees Decisions were resolved in the Final Fees Decision. 2009 WL 1838979. The most important aspect of this decision was the finding that the Laffey matrix did not provide an appropriate basis for determining the reasonable hourly rate

¹ This process of awarding some undisputed amount in an interim decision and reserving disputed issues until a later decision occurred before the Federal Circuit held that interim decisions were final decisions, subject to immediate appeal. Shaw v. Sec'y of Health & Human Servs., 609 F.3d 1372 (Fed. Cir. 2010).

for an attorney in the Vaccine Program. Thus, there was no significant change to the calculations in the Interim Fees Decision regarding attorneys' fees for work performed in the merits phase. The Final Fees Decision also awarded costs. Most (but not all) costs were incurred in the underlying claim. Lastly, the Final Fees Decision considered Mr. Masias's fees for fees. This request was generally credited, although not entirely.

The Final Fees Decision awarded \$19,035.25 in attorneys' fees. Almost all of these attorneys' fees were incurred in litigating the fee award. The Final Fees Decision also awarded \$14,873.32 in costs.

Mr. Masias filed a motion for review of the Final Fees Decision. Mr. Masias's primary argument was the availability of Laffey rates. In an unpublished order issued on December 10, 2009, the Court of Federal Claims denied the motion for review. The Clerk's Office entered judgment in the amount of \$33,908.57.

Shortly after the Court's action, Mr. Masias requested fees, covering from May 7, 2009 to January 4, 2010, mostly for the motion for review. Pursuant to Vaccine Rule 34, the Court remanded. The undersigned awarded \$25,841.40, for the motion for review, even though the motion for review did not change the outcome. Supplemental Fees Decision, 2010 WL 1783542. This decision went to judgment on May 26, 2010.

To recap, by April 2010, Mr. Masias had been awarded approximately \$42,000 in fees for the merits of his claim and approximately \$45,000 in fees relating to fees. Mr. Masias filed an appeal with the Federal Circuit on February 17, 2010.

This filing of a notice of appeal starts the lists of activities for which Mr. Masias presently seeks fees. The pending application seeks compensation for approximately 150 hours for the initial Federal Circuit appeal.

The Federal Circuit affirmed the judgment. In regard to the finding that Mr. Moxley should not be compensated at Laffey rates, the Federal Circuit relied, in part, upon its recently issued decision in Rodriguez v. Sec'y of Health & Human Servs., 632 F.3d 1381, 1384 (Fed. Cir. 2011).² The Federal Circuit also rejected Mr. Masias's other arguments. Masias v. Sec'y of Health & Human Servs., 634 F.3d 1283 (Fed. Cir. 2011).

Mr. Masias sought rehearing from the Federal Circuit. The pending fee application seeks compensation for approximately 26 hours on the rehearing request. The Federal Circuit denied this request.

² Mr. Rodriguez also had claimed that his attorney should be compensated at Laffey rates. The litigation over fees in Rodriguez moved roughly in sequence with the litigation over fees in Mr. Masias's case.

Mr. Masias filed a petition for certiorari. The pending fee application seeks compensation for approximately 100 hours. The Supreme Court denied certiorari. Masias v. Sebelius, 132 S.Ct. 815 (2011). Once the Supreme Court denied certiorari, there were no direct appeals available to change the outcome of the December 15, 2009 judgment. The Secretary represented that the government has satisfied this judgment. Resp't Resp., filed April 10, 2012, at 2 n.2.

B. Mr. Masias's Pending Fee Application

Mr. Masias initiated another fee request, but there is a wrinkle to this request. Mr. Masias filed his fee application with the Federal Circuit directly. In doing so, Mr. Masias followed the approach taken by Mr. Rodriguez, who had also filed an application with the Federal Circuit. The Federal Circuit, in a non-precedential order, denied Mr. Rodriguez's request for fees. Then, Mr. Masias sought to withdraw his fee application from the Federal Circuit and the Secretary opposed this withdrawal. The Federal Circuit granted Mr. Masias's motion to withdraw his fee request.

Mr. Masias filed the pending fee application with the Office of Special Masters on February 29, 2012. Mr. Masias requested \$46,030 for the Federal Circuit appeal (exhibit 95) and \$85,120 for the Federal Circuit rehearing and the Supreme Court work (exhibit 96).

The Secretary filed a lengthy opposition, presenting several arguments. For purposes of this decision, the decisive argument is that Mr. Masias "is not entitled to any fees for his wholly unsuccessful litigation over his attorney's hourly rate." Resp't Resp. at 6. The Secretary's remaining arguments are directed to the amount of fees, an issue not reached here.

Mr. Masias filed a reply on May 1, 2012, arguing that he is eligible for attorneys' fees for his appellate litigation. Pet'r Reply at 5-6. Although Mr. Masias defended the amount of fees he requested, these other arguments are not relevant to the fundamental question of whether he is entitled to any fees for appeals that did not increase the amount of fees previously awarded.

II. ANALYSIS

In American jurisprudence, each party to litigation usually pays for his or her attorney. Congress has altered this scheme by passing legislation changing the usual allocation of attorneys' fees in a variety of situations. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975). The Vaccine Act is one of these statutes.

The Vaccine Act mandates an award of attorneys' fees to any petitioner who receives compensation. 42 U.S.C. § 300aa-15(e). Because Mr. Masias received compensation via the December 27, 2007 Decision, he was entitled to attorneys' fees for his attorneys' work in that stage of the case. Mr. Masias was awarded those fees in 2009. Interim Fees Decision. Mr. Masias has also been awarded fees for his attorney's work in litigating the initial fee request,

Final Fees Decision, and fees for his attorney's work in appealing the fee determination via the motion for review, Supplemental Fees Decision.

Mr. Masias's pending fee application does not concern any work the attorney did in the merits phase. The pending fee application addresses only appellate work performed in an attempt to increase the amount of fees previously awarded. "Fees awarded for the defense of an initial fee application are commonly referred to as 'supplemental fees' or 'fees on fees.'" Wagner v. Shinseki, 640 F.3d 1255, 1259 (Fed. Cir. 2011).

In opposing Mr. Masias's pending fee application for supplemental fees, the Secretary relies upon Wagner. There, the Federal Circuit considered the Court of Appeals for Veterans Claims's denial of a veteran's request for supplemental fees pursuant to the Equal Access to Justice Act ("EAJA"). The Federal Circuit stated that Mr. Wagner "should be awarded supplemental fees commensurate with the degree of success he achieved." 640 F.3d at 1259. The Federal Circuit traced this "degree of success" standard back to Comm'r, Immigration & Naturalization Serv. v. Jean, 496 U.S. 154 (1990). According to the Federal Circuit, Jean supports the proposition that "supplemental fees should be denied 'to the extent' that a claimant's defense of his original fee application proves unsuccessful." 640 F.3d at 1259-60, citing Jean, 496 U.S. at 163 n.10. In accord with this proposition, the Federal Circuit cited seven cases in which courts reduced the amount awarded in a supplemental fee application due to reductions in the initial fee application. See 640 F.3d at 1260-61.

Although Wagner concerned the EAJA, its holding regarding "degree of success" may be transferred to an analysis under the Vaccine Act because "similar language in the various fee-shifting statutes should be interpreted alike absent some indication to the contrary." Avera, 515 F.3d at 1348 (citing cases involving the Individuals with Disabilities Education Act, the Resource Conservation and Recovery Act, the Civil Rights Attorney's Fee Awards Act of 1976, and the Voting Rights Act). Mr. Masias, although in a slightly different context, agrees that "federal fees jurisprudence should be generally applied under fee-shifting statutes." Reply at 13 (citing, among other cases, Avera). Wagner and the cases on which it relies, including the Supreme Court's decision in Jean, show that in "federal fees jurisprudence," an award of supplemental fees depends upon the outcome of the initial fee request.³

Further support for using "the degree of success" standard in a Vaccine Program case comes from the Federal Circuit's denial of Mr. Rodriguez's request for supplemental fees in a

³ Although outside of the Vaccine Program, two other cases reaching a similar result are United States v. Eleven Vehicles, 200 F.3d 203, 211 (3d Cir. 2000) (stating the fee applicants were not entitled to fees for an unsuccessful motion for attorneys' costs), and Thompson v. Gomez, 45 F.3d 1365, 1368-69 (9th Cir. 1995) (stating "Plaintiffs seek attorney's fees for work performed on this appeal. Fees may be awarded for work performed on successful appeals of the district court's award, but not for unsuccessful ones.").

nonprecedential order, filed February 17, 2012.⁴ The Federal Circuit’s order, which the Secretary cited and filed in Mr. Masias’s case, states that Mr. Rodriguez’s appeal was “unsuccessful.” Although the February 17, 2012 order does not mention Wagner, the denial of Mr. Rodriguez’s request for supplemental fees is consistent with the reasoning in Wagner.

Mr. Masias’s does not effectively counter Wagner.⁵ Mr. Masias’s explanation for his eligibility for attorneys’ fees for litigating his fee request rests upon the Federal Circuit en banc decision in Cloer v. Sec’y of Health & Human Servs., 675 F.3d 1358, 1362 (Fed. Cir. 2012) (en banc).⁶ However, supplemental fees were not addressed by the Circuit in Cloer. Cloer, therefore, does not modify the holding in Wagner that “supplemental fees should be denied ‘to the extent’ that a claimant’s defense of his original fee application proves unsuccessful.” 640 F.3d at 1259-60.⁷

Here, the application of the “degree of success” principle to Mr. Masias’s pending request is straightforward. Mr. Masias achieved no success on his Federal Circuit appeal. In simple terms, the judgment of the Court of Federal Claims required a payment of \$33,908.57. The Federal Circuit did not increase the amount owed at all. Therefore, Mr. Masias is not awarded any attorneys’ fees for entirely unsuccessful appellate fee litigation.

This result, a denial of supplemental fees, is consistent with the result of Mr. Rodriguez’s Federal Circuit application for fees. The circumstances of Mr. Rodriguez’s case are on all fours with Mr. Masias’s case because both appellants-petitioners were attempting to increase the hourly rates for their attorneys. Without any basis for distinguishing Rodriguez, the outcome in

⁴ As a “nonprecedential disposition,” the Rodriguez order may offer “guidance.” Federal Circuit Rule 32.1(d).

⁵ Mr. Masias’s reply brief does not address Wagner explicitly. At best, Mr. Masias comments “while the government cites other authorities in support of the argument, it is groundless.” Reply at 5. Much later in the brief, Mr. Masias cites a collection of cases from other circuits involving “fees for fees.” Reply at 13 n.18. Those cases are inapposite because there is no dispute that Mr. Masias is entitled to fees for litigating his original fee request. The Final Fees Decision awarded Mr. Masias this compensation. The cases Mr. Masias cites do not support awarding fees for unsuccessful appellate litigation over fees.

⁶ The Federal Circuit issued Cloer on April 11, 2012, one day after the Secretary filed her response to Mr. Masias’s pending application.

⁷ Relying on Wagner may appear inconsistent with Broekelschen v. Sec’y of Health & Human Servs., No. 07-137V, 2012 WL 1203361 (Fed. Cl. Spec. Mstr. Feb. 21, 2012), in which a request for “supplemental fees” was evaluated using the “reasonable basis” standard, rather than the “degree of success” standard. However, in Broekelschen, the Secretary did not cite Wagner. The Secretary’s different argument makes a different result.

the two cases should be the same even though Rodriguez does not mandate a denial of fees to Mr. Masias.⁸

III. CONCLUSION

Mr. Masias's pending application requests supplemental attorneys' fees, that is, fees incurred in appeals seeking to increase the amount previously awarded in fees. As a case involving fees for fees, the "degree of success" standard from Wagner controls the outcome of Mr. Masias's application. Here, Mr. Masias achieved no success because his appeals did not increase the amount awarded in attorneys' fees. Thus, he is not eligible for an award of supplemental fees. The Clerk's Office is instructed to enter judgment denying Mr. Masias's February 29, 2012 application for attorneys' fees unless a motion for review is filed.

IT IS SO ORDERED.

S/Christian J. Moran
Christian J. Moran
Special Master

⁸ Given this resolution, it is not necessary to determine the amount of supplemental fees to which Mr. Masias would be awarded if he were entitled to any attorneys' fees.